Supreme Court, U.S.
FILED
MAR 31 1992
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No. 91-1500

In The

# Supreme Court of the United States

October Term, 1991

GLENN M. SHRIVER,

*Petitioner,*

vs.

GAF CORPORATION,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit where there are no federal questions and no conflicting appellate decisions implicated in the district court's determination that an action brought more than six years following an injury is barred by the statute of limitations.

2. Whether this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit where the Court below held that Petitioner's action, commenced more than six years following an injury, is time barred regardless of whether the Pennsylvania two-year or Maryland three-year statute of limitations was applicable.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are the petitioner, Glenn M. Shriver, and the respondent, GAF Corporation.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent GAF Corporation ("GAF") respectfully opposes petitioner's writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The Order of the Court of Appeals for the Third Circuit dated December 4, 1991, denying rehearing, has not been reported. It is reproduced in Petitioner's Appendix B ("Pet. App. B").

The Judgment Order of the Court of Appeals for the Third Circuit dated November 7, 1991 has not been reported. It is reproduced in Petitioner's Appendix A ("Pet. App. A"). The Opinion of the United States District Court for the Middle District of Pennsylvania dated April 24, 1991 has not been reported. It is reproduced in Petitioner's Appendix C ("Pet. App. C").

## STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Pennsylvania Statute involved, 42 Pa.C.S.A. Section 5524(2) is set forth in petitioner's brief at p. 4. The Maryland Statute involved, Maryland Code (1984), Courts and Judicial Proceedings, Section 5-101 is set forth in petitioner's brief at pp. 3-4. The Federal Statute involved, 16 U.S.C. Section 457 is set forth in petitioner's brief at p. 3. Federal Rule of Civil Procedure 41(b) is set forth in petitioner's brief at p. 7.

## STATEMENT OF THE CASE

This case involves a claim for personal injuries instituted in the United States District Court for the Middle District of Pennsylvania (the "district court") more than

six years following the date of injury. On or about April 17, 1990, Petitioner, Glenn M. Shriver ("Shriver"), filed this products liability action against Respondent, GAF Corporation ("GAF"), alleging that he was over-exposed to ammonia fumes at his work place on or about March 5, 1984. Shriver also claims the exposure caused him to develop hypersensitivity to ammonia fumes.

Following discovery, which included a review of Shriver's medical and employment records, workmen's compensation documents, letters from his prior attorney, Answers to Interrogatories and the deposition testimony of Shriver; GAF filed a Motion for Summary Judgment because Shriver's claims were barred by both the Pennsylvania two-year and Maryland three-year statutes of limitations.

On April 24, 1991, the district court entered an Order and Judgment granting GAF's Motion for Summary Judgment. The district court found that Shriver suffered an ascertainable and actionable injury in 1984, and knew or had reason to know that his recurring symptoms arose from that incident. On May 23, 1991, Shriver appealed the April 24, 1991 Order and Judgment to the United States Court of Appeals for the Third Circuit (the "Court of Appeals"), which affirmed on November 7, 1991, "for the reasons set forth in the opinion of the district court." Pet. App. A-2. The same court denied Petitioner's motion for rehearing on December 4, 1991. Pet. App. B-2. This petition for writ of certiorari followed.

Respondent hereby adopts the recitation and application of the facts set forth in the district court's opinion, Pet. App. C. Respondent believes Petitioner inaccurately

represents to this Court that doctors were unable to establish the cause of Petitioner's illness until April 19, 1988. Although Shriver did not file a Complaint against GAF alleging he was over-exposed to ammonia fumes from a GAF blueprint copy machine until April 17, 1990, Shriver admitted his exposure to ammonia fumes occurred at his workplace more than six years prior to filing this lawsuit, beginning on March 5, 1984. Pet. App. C-10. As a result of this over-exposure, Shriver developed immediate symptoms including burning eyes, burning skin, dizziness, a feeling of collapse, itchiness, choking feeling and a feeling of fire in his lungs which were diagnosed by various physicians and labeled hypersensitivity to ammonia fumes. Shriver knew his injury was related to his ammonia exposure of March 5, 1984 when, on March 21, 1984 he filed a Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/ Compensation with the U.S. Department of Labor. He also knew of his potential claim against GAF by March 27, 1985, when his attorney advised him that the claim must be timely filed.

In an attempt to avoid the statute of limitations bar, Shriver claims that although his symptomatology was continuous, ongoing and the direct and proximate result of the March 5, 1984 exposure, the statute did not begin to run until April 19, 1988, a date when he claims to have learned his condition was labeled "hypersensitivity to ammonia." As the district court stated, "there is no dispute that plaintiff was aware that he was injured in 1984, that his injury was caused by defendant's alleged negligence, or that his respiratory problems were aggravated by his exposure to low doses of ammonia between 1984

and 1986," Pet. App. C-5. The district court found, after "close examination of the deposition, medical records, and correspondence with attorneys" that Shriver "knew, or certainly had reason to know, that he suffered a recurring reaction to ammonia (regardless of the label) which would not have occurred but for the initial accident." Pet. App. CIO-II.

As the petitioner knew or should have known of his illness and his right to sue by 1984, or by 1986 at the latest, his suit filed in 1990 is time barred, regardless of whether the Pennsylvania two year statute of limitations or the three year Maryland statute of limitations applies.

## REASONS FOR DENYING WRIT

A review on writ of certiorari is a matter of judicial discretion, and will be granted "only when there are special and important reasons therefore." Rule 10.1, Supreme Court Rules. In this case, a writ of certiorari should be denied because there is no substantial federal question which requires determination. There is no conflict among the Courts of Appeal, and the Court of Appeals below did not decide a federal question in a manner conflicting with any decisions of this Court.

The decision of the United States District Court for the Middle District of Pennsylvania, affirmed by the Appellate Court, is in accord with the decisions of other district courts in finding that when a party is injured on federal property, the *substantive* law, but not the *procedural* law, of the state surrounding the federal property must prevail. There are no principles important to the

public which must be settled here, and no substantial federal questions to resolve.

Furthermore, the state law grounds for judgment, namely that the Petitioner's action is barred by both the Pennsylvania and Maryland statutes of limitations, is an independent and adequate ground for determining the issue. Specifically, because Petitioner's claim is barred regardless of whether the Pennsylvania or the Maryland statute of limitations is applicable, a determination that federal law does or does not require the application of either Pennsylvania or Maryland's statute of limitations will not impact the outcome of the case. Therefore, any determination of a purported Federal question will effectively be advisory only.

**I. There are no "special and important" reasons for granting the writ of certiorari.**

A review on writ of certiorari is a matter of judicial discretion, and will be granted "only when there are special and important reasons therefore." Rule 10.1, Supreme Court Rules. These "special and important reasons" include a conflict between United States courts of appeal on the same matter; a conflict between a state court of last resort and a United States court of appeals; when a state court or United States court of appeals decides a question of federal law in a way which conflicts with an opinion of the United States Supreme Court; or where a United States court of appeals has decided an important question of federal law which "should" be settled by the United States Supreme Court. Rules 10.1(a)-(c), Supreme Court Rules. Although the list is not

exhaustive, none of these issues is present in this case, and petitioner asserts no other reason that this Court should grant a writ of certiorari. As stated by Mr. Chief Justice Taft, speaking for a unanimous Court,

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which are important to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the Circuit Courts of Appeals." *Rice v. Sioux City Memorial Park Cemetery*, 75 S.Ct. 614 (1955), citing *Lavne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S.Ct. 422, 423, 67 L.Ed. 2d 712.

Petitioner admits in his brief that there is no conflict on this issue in the district courts, and no conflicting authority on the issue in the Courts of Appeal. Petitioner's brief at page 19. Petitioner asserts no public principle of great importance which needs to be or which ought to be settled. The only purpose of this petition for writ of certiorari is an attempt by the Petitioner to avoid the bar of the statute of limitations on his personal injury claim.

## II. A district court sitting in diversity applies the forum's choice of law rules in determining the applicable statute of limitations.

It is undisputed that a district court sitting in diversity applies the forum's choice of law rules in determining the applicable statute of limitations in an action under 16 U.S.C. Section 457. The law of diversity jurisdiction

states that, "a federal court, sitting in diversity, follows the forum's choice of law rules to determine the applicable statute of limitations." *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 189 L.Ed. 2079 (1945); *Ross v. Johns-Manville Corp.*, 766 F.2d 823 (1985); and *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir. 1980), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed. 2d 237 (1980). Consistent with that principle, the district court applied the Pennsylvania statute of limitations because under both Pennsylvania and Maryland law the statute of limitations is procedural.[1]

Thus, under diversity jurisdiction, the statute of limitations of the forum (Pennsylvania) applies to this case. Furthermore, even if a federal question was at issue, Pennsylvania's statute of limitations would apply. "Generally, when Congress has created a federal right but not prescribed a period for its enforcement, federal courts will borrow the most closely analogous statute of limitations of the state in which the federal court sits . . . " *Quadrini v. Sikorsky Aircraft Division*, 425 F. Supp. 81 (D. Conn. 1977), on reconsideration on other grounds, 505 F.2d 1049 (1981), citing *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed. 2d 295 (1975) and other cases. Although in his brief at page 20, petitioner contends that *Quadrini* is erroneous, Petitioner then states

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[1] By convoluted reasoning Shriver attempts to convince this court to ignore the law of Maryland by suggesting F.R.C.P. 41(b) converts all statutes of limitation to substantive law. F.R.C.P. 41(b) applies to orders of dismissal and is for use when a plaintiff's right has been extinguished in one court and plaintiff then attempts to bring the same action in a second court.

at page 24 of his brief that "We do not quarrel with the holding of the *Johnson* case".

Even though Shriver admits that a federal court will generally apply the statute of limitations of the forum (i.e. Pennsylvania), he claims that 16 U.S.C. § 457 supports an argument that Maryland's statute of limitations nevertheless applies in this case. Shriver's position is unfounded. 16 U.S.C. Section 457 states that when a party is injured on federal property, the *substantive* law, but not the *procedural* law, of the state surrounding the federal property must prevail. *See Quadrini v. Sikorsky Aircraft Division*, 425 F. Supp. 81 (D. Conn. 1977), on reconsideration on other grounds, 505 F. Supp. 1049 (1981); *Reed v. Charizio*, 183 F. Supp. 52, 53 (E.D. Vp. 1960); *Morley v. Cohen*, 610 F. Supp. 798, 827 (D.C. Md. 1985).[2] Since Maryland law holds that a statute of limitation is procedural,[3] Shriver's argument must fail. As both Pennsylvania and

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[2] Furthermore, it appears that Petitioner accepts this as correct law. See District Court Opinion, Pet. App. C-2 ("We agree with plaintiff (i.e. petitioner) that when a party is injured on federal property, the substantive law, but not the procedural law, of the state surrounding the property must prevail.")

[3] As the district court stated "plaintiff overlooks relevant Maryland precedent which holds that the statute of limitations is a procedural matter governed by the law of the forum." Pet. App. C-2-3. Maryland's own position on this issue is carefully ignored by Shriver, because it is clear that Maryland recognizes that a statute of limitations is procedural and that, as to matters of procedural law, Maryland applies the law of the forum. *Doughty v. Prettyman*, 219 Md. 83, 88, 148 A.2d 438 (1959); *Morley v. Cohen, supra*, (Md. 1985); *Leonard v. Wharton*, 268 F. Supp. 715, 718 (D. Md. 1967), appeal dismissed, 396 F.2d 452 (4th Cir. 1968), *cert. denied*, 393 U.S. 1028, 89 S.Ct. 624, 21 L.Ed. 2d 571 (1969); *see also Mills v. International Harvester Co.*, 554 F. Supp. 611, 612 (D. Md. 1982).

Maryland consider statutes of limitation to be procedural, the district court was correct in applying the procedural (i.e. limitations) law of the forum, Pennsylvania. That decision is wholly consistent with existing law.

## III. The Pennsylvania choice of law rules require the application of the Pennsylvania two-year statute of limitations, which bars petitioner's cause of action, as the injury was discovered or should have been discovered in 1984 or at latest by 1986, and suit was not filed until 1990.

The Pennsylvania statute of limitations for personal injury claims is "two years from the time that injury was done." 42 Pa. C.S.A. § 5524(2). The "injury is done when the act heralding a possible tort inflicts damage which is physically objecti[ve] [sic] and ascertainable." *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063, 1072 (M.D. Pa. 1988); *see also Merry v. Westinghouse Electric Corp.*, 684 F. Supp. 852, 854 (M.D. Pa. 1988).

Pennsylvania has adopted the discovery rule, which states that the statutory period commences from the time a plaintiff knows or reasonably should have known the cause of his or her injury. *Bayless v. Philadelphia National League Club*, 579 F.2d 37, 39 (3d Cir. 1978), aff'd. 615 F.2d 1352 (1980). Under the discovery rule, "[t]he burden is on an injured party once he discovers the cause of his injuries to determine within the statutory period the party's whose negligence or breach of duty were responsible for the event or condition." *Piccolini, supra*, 686 F. Supp. at 1071-1072. Pennsylvania applies a two year statute of limitations to personal injuries, and the statute begins to

run when the injured party knows or should know the cause of his or her injury.

The district court determined that Petitioner knew or should have known of his injuries by 1984 or by 1986 at latest.

The district court stated that:

> There is no dispute that plaintiff was aware that he was injured in 1984, that his injury was caused by defendant's alleged negligence, or that his respiratory problems were aggravated by his exposure to low doses of ammonia between 1984 and 1986.

Pet. App. C-5.

Shriver was advised by all of his treating physicians that his injuries were ammonia-related and that exposure to ammonia was detrimental to his health. Petitioner "informed several physicians and admitted in deposition that he believed he had 'recurring symptoms following his anhydrous ammonia accident in 1984' ". Pet. App. C-10. The district court found, after "close examination of the deposition, medical records, and correspondence with attorneys" that Shriver "knew, or certainly had reason to know, that he suffered a recurring reaction to ammonia (regardless of the label) which would not have occurred but for the initial accident." Pet. App. C-10-11. The Court further stated that the information admitted by Petitioner in his applications for occupational disease compensation "coupled with physicians's reports reveal that (petitioner) unequivocally knew, by 1986 at the latest, that his continuing symptoms were caused by the 1984 incident." Pet. App. C-12-13.

Shriver's testimony, medical records, letters from his attorney and workmen's compensation records on which the district court based its finding unalterably establish that Petitioner was on notice of his injuries and their cause by 1984, or by 1986 "at the latest".

## IV. Even if the Maryland three year statute of limitations was to apply, the Petitioner's claim is still time barred.

There is no dispute that Maryland would apply a three year statute of limitations to a personal injury claim filed in its court. Maryland Code (1984), Petitioner's brief at pp. 3-4 ("a civil action shall be filed within three years from the date it accrues.") Clearly, the district court found that the cause of action accrued in 1984 or, "at the latest", by 1986. Therefore, the applicable Maryland statute also bars petitioner's claim, as the injury and its cause were discovered in 1984, or by 1986 at latest, and suit was not filed until 1990.

Whether Maryland or Pennsylvania procedural law applies, Petitioner's action is time barred. The district court found, as noted above, that Petitioner was or should have been aware of his injury by 1984, or by 1986, "at the latest". The Appellate Court affirmed the decision "for the reasons stated" by the district court. As 1986 predates the filing of the suit by more than three years, Petitioner is barred by both Pennsylvania's and Maryland's statutes of limitations.

**V. The statute of limitations (whether Pennsylvania or Maryland) is an adequate and independent state law grounds dispositive of the issues, and thus any decision on a "federal question" would not be outcome determinative.**

The principle that the Supreme Court will not review state court judgments resting on independent and adequate state grounds, even if those judgments also decide questions of federal law, applies whether the state law ground is substantive or procedural. *Coleman v. Thompson*, 111 S.Ct. 2546, 115 L.Ed. 2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed. 2d 308 (reliance by state court on a procedural bar is permissible independent basis for disposition of case); *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed. 2d 408, 85 S.Ct. 564 (1965), *reh. denied*, 380 U.S. 926, 13 L.Ed. 2d 813, 85 S.Ct 878 (The Supreme Court will decline to review state court judgments which rest on independent and adequate state substantive or procedural grounds, even where those judgments also decide federal questions.); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849 (1977) (United States Supreme Court has no jurisdiction to review decision of state court which rests on both federal and state grounds, either of which would be dispositive); *Hathorn v. Lovorn*, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed. 2d 824 (1982) (failure to comply with a state procedural rule may constitute an independent and adequate state ground barring Supreme Court review of a federal question where the procedural rule is regularly followed).

For example, in *Coleman, supra*, this Court stated:

> This Court will not review a question of federal law decided by a state court if the decision of

> that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . This rule applies whether the state law ground is substantive or procedural. (citations omitted).

115 L.Ed. 2d at 655. The *Coleman* Court then quoted from *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 89 L.Ed. 789, 65 S.Ct 459 (1945):

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Although this principle is usually applied to state court and habeas corpus decisions, the same logic should apply in this case. Even if this Court were to determine that the district court was incorrect in applying Pennsylvania law, and its view of the federal law was "corrected" such that 16 U.S.C. section 457 required the application of Maryland procedural law, the same decision would be rendered by the court below. This is undoubted, because the Court's finding that petitioner had legal notice by 1984 or by 1986 "at the latest", assures that a suit brought in 1990, at least four years later, will be barred by a three year statute of limitations (Maryland's) the same as by a two year statute of limitations (Pennsylvania's).

Petitioner's petition for a writ of certiorari is nothing other than an attempt to seek relief from petitioner's failure to file a personal injury claim within the statutory period. Petitioner's claim is clearly barred whether Pennsylvania's or Maryland's statute of limitations applies

(and thus regardless of whether Petitioner could characterize Maryland's statute of limitations as somehow substantive). The only factor which could give relief to the petitioner is a factual finding by this Court that Petitioner did not know of his injuries until some date within the relevant statutory period (i.e. in 1988 or after). The district court found repeatedly that Petitioner knew of his injuries as of 1986, at latest, if not by 1984. The Appellate Court affirmed for the reasons stated by the district court. This Court will not generally review factual findings in which the district court and court of appeal concur. *Branti v. Finkel*, 100 S.Ct. 1287, 445 U.S. 507, 63 L.Ed. 2d 574, 580, fn. 6 (1980) (absent exceptional circumstances, it is settled practice of the Supreme Court to accept factual determinations in which the district court and the court of appeals concur.) The district court's findings in this case are "undisputed", and the Court of Appeals affirmed "for the reasons set forth in the opinion of the district court."

Petitioner's claim is time barred regardless of any determination this Court might make regarding any purported issue of federal law. This fact, along with the fact that the legal doctrines relied upon have not been attacked as faulty or in conflict with other decisions, makes this case an inappropriate case in which to grant a writ of certiorari. No special or important reasons, and in fact no federal question, exists. There is no reason in this case for a writ of certiorari to be granted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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